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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TOMER TZADOK, Plaintiff and Respondent, v. MARIA MONTENEGRO, Defendant and Appellant.	B193365 (Los Angeles County Super. Ct. No. BC338629)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Maria Montenegro, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In this action for the balance due on a residential construction contract, defendant homeowner Maria Montenegro appeals from the default judgment entered in favor of plaintiff contractor Tomer Tzadok. We affirm.

BACKGROUND

On August 19, 2005, Tzadok, a licensed contractor operating under the fictitious business name Eagle Construction, sued Montenegro for the $53,218 balance due on a residential construction contract.[1] Montenegro, after being personally served with the summons and complaint on September 3, 2005, failed to answer or otherwise respond within the 30-day period specified in the summons, which, for the most part, was written in both English and Spanish. (See Code Civ. Proc., § 412.20, subd. (a)(6).)[2] Upon Tzadok's request, Montenegro's default was entered under section 585 on November 1, 2005.[3] Although Montenegro filed an answer on November 3, 2005, she does not dispute that, unless her default is vacated, her answer was untimely.

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[1] Tzadok also sued Montenegro's daughter, Margarita Montenegro-Skinner, against whom a default judgment was also entered, but she is not a party to this appeal.

[2] All further undesignated statutory references are to the Code of Civil Procedure.

[3] Section 585, subdivision (a) provides in part: "Judgment may be had, if the defendant fails to answer the complaint, as follows: [¶] (a) In an action arising upon contract or judgment for the recovery of money or damages only, if the defendant has . . . been served, other than by publication, and no answer, demurrer, notice of motion to strike . . . has been filed with the clerk or judge of the court within the time specified in the summons, or such further time as may be allowed, the clerk, or the judge if there is no clerk, upon written application of the plaintiff, and proof of the service of summons, shall enter the default of the defendant or defendants, so served, and immediately thereafter enter judgment for the principal amount demanded in the complaint, in the statement required by Section 425.11 [personal injury or wrongful death], or in the statement provided for in Section 425.115 [punitive damages], or a lesser amount if credit has been acknowledged, together with interest allowed by law or in accordance with the terms of the contract, and the costs against the defendant . . . ."

Tzadok requested that a default judgment be entered against Montenegro under section 585 and submitted a declaration attesting that the balance due on the construction contract was, as pleaded in the complaint, $53,218. On February 21, 2006, the trial court entered a default judgment against Montenegro for $53,218 plus costs of $428.

Although the caption of the February 21 default judgment correctly listed "Maria Montenegro" as the defendant, the body of the judgment erroneously referred to her as "Margaret Montenegro." On April 27, 2006, the trial court filed a "Corrected Default Judgment by Court" that corrected this mistake. The trial court made the corrected judgment retroactive to the date of the February 21 judgment, which was vacated, by awarding interest from February 21 forward.

On April 27, 2006, Montenegro moved to set aside the default judgment and vacate her default under Code of Civil Procedure sections 473, subdivision (b),[4] and 473.5.[5] Montenegro sought relief based upon her own purported mistake, inadvertence,

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[4] Section 473, subdivision (b) provides in part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . . No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. . . ."

[5] Section 473.5 provides in part: "(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the

surprise, or excusable neglect in ignoring the summons and complaint. Montenegro argued that when she received the summons and complaint in the mail[6] in October 2005, because she "is seventy four years old[and] does not speak or read English[, s]he did not know what the Complaint was and she excusably neglected it. At that time, she asked someone to read it for her. This gentleman, who is a handyman working in her area, told her not to worry about it as it was not important[.] She therefore mistakenly ignored it. Thereafter, she received by mail, two additional copies of the Complaint. Being curious, she asked another friend to read it to her, who at that time recommended she have an attorney review it for her."

Montenegro's attorney, Ted Khalaf, submitted the lone declaration in support of the motion for relief. Khalaf explained that before filing Montenegro's answer, he had checked the superior court's website, which showed that "no default had been taken. . . . After filing the answer, my office never received any notification that Defendant's answer was rejected by either the court clerk or Plaintiff's counsel. Additionally, neither I [n]or Defendant ever received any notification of any Request for Default or any Ent[ry] of Default. [¶] . . . It was not until my office was sending notice of change of address when we checked on the Los Angeles Superior[Court']s website and noticed a default against Defendant. The default was taken on November 1, 2005, two day[s] prior to

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action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered. [¶] (b) A notice of motion to set aside a default or default judgment and for leave to defend . . . shall be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. . . ."

[6] Montenegro's contention that she was served by mail is not supported by the record, which contains no declaration signed by Montenegro. The only sworn statement on this point was made by the process server, Scott Frankel of Janney & Janney Attorney Service, Inc., who attested in the proof of service that he had personally served Montenegro with the summons and complaint at her home on September 3, 2005.

Defendant filing an answer. Had I been aware of the default, I would have filed this motion at that time. [¶] . . . Upon discovering that a default was taken against my client, I immediately called opposing counsel to inform him of the circumstances surrounding this case. Additionally, I advised him that neither [I] nor my client [was] ever given any notice of default. Furthermore, I also advised him that we were never given any notice that Defendant's answer was rejected. At that time, I requested that he stipulate to set aside the default judgment. However, he did not grant my request. Therefore, I was forced to bring this motion."

In opposition, Tzadok argued that: (1) the summons and complaint were served on Montenegro personally, not by mail, and the summons stated, in Montenegro's primary language Spanish, that she was being sued and must act within 30 days or risk having a default judgment entered against her; (2) the notice of request to enter default was served on Montenegro by mail on October 27, 2005, as shown by the sworn proof of service filed on November 1, 2005; (3) Montenegro's claims that she "was surprised, did not understand what she was served with, or does not speak English are falsehoods," given her numerous contacts with Tzadok's attorney Rob Nichols, who tried to resolve the dispute informally before filing the complaint;[7] (4) Montenegro, who did not submit

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[7] Attached as exhibits to Nichols's declaration were his letters to Montenegro, dated May 19, June 2, June 30, and July 8, 2005, requesting the $53,218 balance due under the contract. Nichols also declared that "[o]n the morning of July 7, 2005, Defendant Maria Montenegro telephoned me and we had a conversation. Initially, she spoke Spanish. After some time on the phone, she was quite unpleasant and indignant that I did not have a Spanish interpreter in my office but soon enough was speaking English, though poorly. The conversation did not end well and I told her I would be forced to file a lawsuit against her if she did not act reasonably. She said 'that's all right.' [¶] When I spoke with Ms. Montenegro's daughter, co-defendant Margarita Montenegro-Skinner, the following day, July 8, 2005, she was aware of my telephone conversation with her mother and knew the contents of it. Both Defendants have acknowledged the debt to me but have raised spurious 'disputes' about minor matters concerning the job and who should pay the balance due. During the conversation with the daughter I promised to abstain from filing a lawsuit if she and her mother would provide me with a letter itemizing their 'disputes' so that I could have my client make any necessary repairs. She agreed to this and I have not heard from either Defendant since then, nearly a year now."

her own declaration, failed to meet her burden under section 473 of showing excusable neglect; and (5) the mandatory relief provisions of section 473 for attorney mistake, inadvertence, surprise, or neglect do not apply because Khalaf's declaration "fails to accept any fault for what led up to the taking of the default."

At the hearing below, Montenegro proffered her own declaration, which was rejected as incompetent because it was written solely in English, a language that Montenegro attested she neither speaks nor reads. Although her attorney argued that the declaration had been translated into Spanish "by one of our assistant[s]," neither the translation nor the translator's declaration was produced. The trial court found counsel's argument to be insufficient to establish "whether it was properly translated, what the qualification[s] of the translator are, or [whether] the signatory of this declaration knows what is in this declaration in view of the fact she can't read or understand English."

The trial court denied the motion for relief and this appeal followed. Montenegro has filed an opening brief in pro. per. Tzadok has not filed a respondent's brief. (Cal. Rules of Court, rule 8.220(a)(2).)

DISCUSSION

I. Personal Jurisdiction

Citing section 412.30, Montenegro contends that, as a matter of law, the judgment is void because the proof of service of the summons and complaint did not designate that she was being served as an individual defendant. The contention lacks merit.

Although "[l]ack of personal jurisdiction renders a judgment (or default) void, and the default may be directly challenged at any time" (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1250), Montenegro's reliance upon section 412.30 is misplaced because there were no corporations or unincorporated associations named as defendants in this action. Section 412.30 states: "In an action against a corporation or an unincorporated association (including a partnership), the copy of the summons that is served shall contain a notice stating in substance: 'To the person served: You are hereby served in the within action . . . as a person upon whom a copy of the summons and of the

complaint may be delivered to effect service on said party under the provisions of (here state appropriate provisions of Chapter 4 (commencing with Section 413.10) of the Code of Civil Procedure).' If service is also made on such person as an individual, the notice shall also indicate that service is being made on such person as an individual as well as on behalf of the corporation or the unincorporated association. [¶] If such notice does not appear on the copy of the summons served, no default may be taken against such corporation or unincorporated association or against such person individually, as the case may be."

Given that section 412.30 does not apply because there were no corporate or unincorporated association defendants named in the complaint, Montenegro has failed to establish that the judgment is void under that statute.

II. The Corrected Judgment

The trial court entered a "Corrected Default Judgment by Court" on April 27, 2006, to correct the error in Montenegro's first name. The corrected judgment was made retroactive to the date of the original February 21 judgment, which was vacated, by awarding interest from February 21 forward. Montenegro contends that the corrected judgment is void for lack of jurisdiction to award interest from February 21, because "[t]here can be no interest on a judgment prior to its rendition and entry. (Cal. Const., art. XX, § 22; Code Civ. Proc., § 682.2.)"[8] We are not persuaded.

The trial court may correct a clerical error, but not a judicial error, in a judgment and apply the correction retroactively to the date that the judgment was first entered. (*Gravert v. DeLuse* (1970) 6 Cal.App.3d 576, 581-583.) "In determining whether an error in an order is clerical or judicial, great weight should be placed on the judge's declaration as to the nature of the error. [Citations.]" (*Id.* at p. 581.) The main

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[8] The authorities cited by Montenegro do not support her position. Article XX, section 22 of the California Constitution deals with alcoholic beverages and has no bearing on this appeal. Section 682.2 was repealed effective July 1, 1983. (Stats. 1982, ch. 1364.)

distinction between the clerical and judicial error is that a judicial error is "'*the deliberate result of judicial reasoning and determination*.'" (*Ibid.*) In *Gravert*, the appellate court held that the misspelling of a party's name was a clerical error that could be corrected at any time under the court's inherent power to fix clerical mistakes in its judgments or orders. (*Id.* at pp. 581-582.)

In this case, the record amply supports the trial court's determination that the misspelling of Montenegro's first name was a clerical error that could be corrected at any time and applied retroactively to the date of the original judgment. Nothing in the record indicates otherwise. Accordingly, Montenegro has failed to establish that the trial court lacked jurisdiction to enter the corrected judgment and make it retroactive to the date when judgment was first entered. (See *Gravert v. DeLuse*, *supra*, 6 Cal.App.3d at pp. 581-583.)

III. Discretionary Relief

Montenegro contends that the trial court violated section 2015.5, which allows the use of declarations signed under penalty of perjury, and deprived her of a fair hearing by excluding her declaration. We disagree.

Given that the proffered declaration was written solely in English, a language that Montenegro attested she neither speaks nor reads, the trial court requested foundational facts (Evid. Code, §§ 402, 403) establishing her competence "to be understood, either directly or through interpretation by one who can understand" her. (Evid. Code, § 701, subd. (a)(1).) Although her attorney argued that the declaration had been translated into Spanish "by one of our assistant[s]," neither the translation nor the translator's declaration was produced below. The trial court was not required to accept counsel's word that the declaration was properly translated by a qualified translator, or that Montenegro had personal knowledge of its contents. Accordingly, Montenegro has failed to meet her burden on appeal of establishing that the trial court erred in excluding her declaration.

In addition, Montenegro has failed to show that any conceivable error was prejudicial. (Evid. Code, § 354; Cal. Const., art. VI, § 13.) Given that the summons contained a Spanish advisement that she was being sued and must respond within 30 days, even if the court had accepted Montenegro's claim that she cannot read English, she has not demonstrated how her declaration would have changed the outcome of her motion for relief.

IV. Mandatory Relief

Montenegro contends that the trial court erred by failing to grant relief under the mandatory relief provision of section 473, subdivision (b), based on her attorney's confession of fault. We disagree. There was nothing in Khalaf's declaration that can be construed as a confession of fault. At best, he merely stated that had he known of the default earlier, he would have sought relief earlier. He did not accept blame for Montenegro's failure to answer or otherwise respond to the complaint before her default was entered.

V. Tzadok's Standing

Montenegro argues that Tzadok lacks standing to prosecute this action because he is not the real party in interest. She contends that according to the complaint, a corporation called Eagle Construction is the real party in interest. The contention lacks merit, however, because the complaint does not describe Eagle Construction as a corporation, but as a fictitious business name. The complaint's caption identifies the plaintiff as "TOMER TZADOK doing business as EAGLE CONSTRUCTION." Similarly, the complaint's opening paragraph states that "Plaintiff TOMER TZADOK is, and at all times relevant to this action was, an individual doing business as EAGLE CONSTRUCTION . . . ."

VI. Tort Liability

Montenegro contends that the default judgment awarded excessive damages by imposing joint liability against Montenegro and her daughter, Margarita Montenegro-Skinner, who is not a party to this appeal. To the extent that Montenegro-Skinner is liable for the judgment, Montenegro lacks standing to challenge that aspect of the award. And to the extent that Montenegro's daughter has paid or will pay the judgment, Montenegro will benefit from, and not be prejudiced by, her contribution.

Montenegro also contends that the complaint contained no allegation that she owns an interest in the property that was the subject of the agreement. Paragraph 5 of the complaint, however, alleged that Montenegro "was, and now is, the owner or reputed owner of a fee interest in the subject property."

Montenegro further argues that Tzadok is not entitled to damages for fraud or tort. As the only damages awarded were contract damages for the unpaid balance due under the agreement, the contention lacks merit.

DISPOSITION

The judgment is affirmed. Tzadok is awarded costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.